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704707—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. ——

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. M. BECK, MAE WARD BYERLY, AND GEORGE CARRUTHERS, TRUSTEES, J. A. BYERLY TRUST

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that if a writ of certiorari is granted to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the case of *J. A. Byerly* v. *Commissioner*, petition for which has heretofore been filed (No. 298, this Term), and the judgment below in that case is reversed on the merits, then and in that event only a writ of certiorari should issue to review the judgment of that court entered in this case and the judgment below in this case should be reversed.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 17–28) has not been reported. The Circuit Court of Appeals rendered a single opinion for this case and *J. A. Byerly* v. *Commissioner* (R. 36–39) which is reported at 154 F. 2d 879.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 17, 1946. (R. 36.) Upon application made to Mr. Justice Reed the time within which the Commissioner may file a petition for a writ of certiorari was extended on July 13, 1946, to and including September 1, 1946 (R. 39–42). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the income of a trust created by J. A. Byerly is taxable income of Byerly, as the Commissioner successfully contended below in *J. A. Byerly* v. *Commissioner,* or taxable income of the trust. The Commissioner contends only that if the income is not Byerly's and the judgment below in *J. A. Byerly* v. *Commissioner* is reversed, a large part of the income is taxable to the trust and the judgment below in this case must be reversed.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the

same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Sections 22 (a), 161 (a) and (b) and 162 (c) of the Internal Revenue Code (26 U. S. C. 1940 ed., Secs. 22, 161 and 162) contain provisions identical with the provisions of the Revenue Act of 1938 above quoted.

STATEMENT

This case is related to the case of *J. A. Byerly* v. *Commissioner* (No. 298) decided under the same opinions in the courts below (R. 17, 36), in which a petition for a writ of certiorari was filed on behalf of J. A. Byerly and the case docketed on July 15, 1946. Both cases involve taxability of the income of a trust established by J. A. By-

erly under a trust indenture dated December 31, 1935.

By that indenture J. A. Byerly transferred to the trustees of the "J. A. Byerly Trust" 8,100 shares of common stock of J. A. Byerly Company. (R. 18–19.) The beneficiaries of the trust were the grantor's wife and his two sons. (R. 21.) The indenture provided (R. 19–20):

> (c) Out of the net income of the trust estate the Trustees shall pay to each of the beneficiaries his or her proper share of said net income from said trust estate in periodic payments to be determined by the Trustees, but in any event, not less than once in each calendar year, provided, however, that if in the better judgment of the Trustees they deem it advisable not to make payments to the Beneficiaries during the calendar year, but to hold such income, or any part thereof, or make investments for their benefit, the Trustees shall then make credits to the account of each Beneficiary of that amount which would have been paid to each Beneficiary had payment been made, but not less than once in each calendar year.

The trust was to endure throughout the lifetime of the last surviving beneficiary and until the youngest of any living lawful issue of a beneficiary should reach the age of 21 (R. 21–22) unless sooner terminated by the trustees with the consent of the beneficiaries (R. 20) or by operation of law.

The Commissioner determined deficiencies in income tax of J. A. Byerly for the years 1937, 1938, 1939, and 1941, attributing to him the income of the shares which he had transferred to the trust. The Commissioner did so on the ground that the trust income was taxable to Byerly under Section 22 (a) of the Revenue Acts of 1936 or 1938 or the Internal Revenue Code, because—"By reason of the close family relationship and your choice of trustees, together with other rights retained, it appears that you could dominate and control the property and income of the trust during all the years here involved." See *J. A. Byerly* v. *Commissioner,* R. 15, 30. In order to protect the revenues against the event that his assertion of deficiencies against Byerly should not be sustained, the Commissioner also determined deficiencies in income tax of the trust for the years 1938, 1939, and 1940, on the ground that "The income is being accumulated and reinvested, and no distribution or credit as such was made to the beneficiaries. However, a deduction was claimed on the fiduciary return in each of the years here involved for amount distributable to beneficiaries, under section 162 (b) of the Revenue Act of 1938 and similar provisions of the Internal Revenue Code." (R. 13.)

Byerly, in No. 298, and the trust, in the present case, each filed petitions for redetermination of the deficiencies asserted by the Commissioner. The

cases were heard together in the Tax Court and a single transcript was taken and the cases were disposed of under the same findings of fact and opinion, which appear at R. 17–28. The Tax Court entered its decisions sustaining the deficiencies asserted against Byerly as grantor in No. 298 and thereafter Byerly filed a petition for review of those decisions by the court below. On the same date, May 2, 1944, the Tax Court entered its decision holding that there were no deficiencies in the present case (R. 28), and on August 1, 1944, the Commissioner filed a petition for review of that decision by the court below (R. 29). The Commissioner's assignment of error in the court below in the present case was in the alternative, that only in the event that the court should reverse the decisions of the Tax Court involved in No. 298, the Tax Court erred in entering its decision that there are no deficiencies in income tax of the trust for 1938, 1939, and 1940. (R. 31–32.) The parties were and still are in agreement that if the decisions in No. 298 should be reversed, then the deficiencies here under review should be upheld, except that the deficiencies here should be reduced by reason of deductions from trust income under Section 162 (c) of the Revenue Act of 1938 and the Internal Revenue Code, *supra,* for federal income taxes paid by the trust for the account of the beneficiaries. (R. 17, 25, 32; No. 298, R. 46–48.)

The court below, on April 17, 1946, affirmed the decision of the Tax Court in *J. A. Byerly* v. *Commissioner,* holding that "there was ample evidence to sustain the Tax Court's finding that the trust income in controversy is taxable to the settlor, who set up a trust for the nominal benefit of his wife and two minor sons." (R. 38.) The court noted the concession by the parties that in the event the decision of the Tax Court in *J. A. Byerly* v. *Commissioner* should be affirmed, its decision in this case should also be affirmed. (R. 38.) Accordingly, it affirmed in both cases. (R. 38.)

SPECIFICATION OF ERRORS TO BE URGED

If the Circuit Court of Appeals erred in its holding in *J. A. Byerly* v. *Commissioner,* No. 298, that the income of the J. A. Byerly Trust for the years 1937, 1938, 1939 and 1941 is taxable to J. A. Byerly, the grantor of the trust, then, and only in that event, the Circuit Court of Appeals erred in holding that the trust income for 1938, 1939 and 1940, less appropriate deductions under Section 162 (c) for income taxes paid by the trust for the account of the beneficiaries, is not taxable income of the J. A. Byerly Trust within the meaning of Section 162 of the Revenue Act of 1938 and the Internal Revenue Code, and in affirming the decision of the Tax Court in this case.

REASONS FOR GRANTING THE WRIT

For reasons which will be set forth in a memorandum opposing the issuance of a writ of certiorari in *J. A. Byerly* v. *Commissioner,* No. 298, it is submitted that the judgment below in that case is correct and presents no ground for review by this Court. If the Court accepts that view and denies certiorari in that case, no writ should issue here, for, by the agreement of the parties as shown in the record, it then follows as a matter of course that the judgment below in this case should go undisturbed.

However, if the Court determines to grant the writ sought by J. A. Byerly in No. 298, then the protection of the revenues and the same agreement of the parties requires that the present case should be held open and the decision of the Tax Court should not be permitted to become final, as it would under Section 1140 of the Internal Revenue Code if no petition for a writ of certiorari were pending before this Court. The appropriate disposition of the present case requires that the judgment below be reversed if the judgment below in No. 298 is reversed, for if the income of the J. A. Byerly Trust is not taxable to the grantor as the courts below held it to be in No. 298, then the income must be held to be taxable income of the trust or the beneficiaries under Section 162 of the Revenue Act of 1938 and the Internal Revenue Code, *supra,* pp. 3–4.

The trust is not a trust the income from which is currently distributable to the beneficiaries and hence taxable to them rather than the trust under Section 162 (b), but is a discretionary trust so that the trust may deduct only amounts properly paid or credited to the beneficiaries under the trust in accordance with Section 162 (c). The only amount so paid or credited consists of income taxes paid by the trust on account of income taxes of the beneficiaries. Hence, as the parties have agreed, a large part of the deficiency asserted by the Commissioner against the trust in this case should be sustained.

Accordingly, if the petition of J. A. Byerly for a writ of certiorari in No. 298 is denied, this petition should also be denied, but if the petition in No. 298 is granted, then action on this petition may appropriately be withheld until the decision of that case on the merits. At that time, if the judgment below in No. 298 is affirmed, this petition may be denied, but if the judgment below in No. 298 is reversed, then this petition should be granted so that the judgment below can be reversed and the case remanded to the Tax Court for a proper determination of the deficiencies in income tax of the trust.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

AUGUST 1946.

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